

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2044

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-2044

FRANK J. BERARD, JR.,

Appellant,

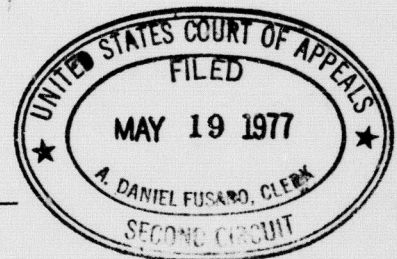
v.

CORNELIUS HOGAN,
COMMISSIONER OF CORRECTIONS,

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLANT,
FRANK J. BERARD, JR.



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PRELIMINARY STATEMENT

This is an appeal from a denial of a petition for a writ of habeas corpus by order of James S. Holden, Chief Judge of the United States District Court for the District of Vermont, issued March 8, 1977. This opinion is in the process of being published. The citation is as yet unavailable.

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ISSUES PRESENTED

Three issues are presented by this appeal from the denial of a petition for a writ of habeas corpus:

1. Did the trial court violate appellant's Sixth Amendment Confrontation Clause and Fourteenth Amendment Due Process Clause rights by restricting cross-examination of a crucial prosecution witness on certain matters going to her credibility?

To decide this question, the Court must address two issues raised by the District Court opinion:

2. Were these questions on the possible bias of this crucial witness "collateral" or "tangential" inquiries, and thus outside the sphere of Sixth Amendment protections?

3. Does the appellant have to demonstrate that he was prejudiced by the trial court's limitations on cross-examination?

STATEMENT OF THE CASE

This case is an appeal from a Memorandum and Order of The Honorable James S. Holden, Chief Judge of the Federal District Court for the District of Vermont, issued March 8, 1977, denying appellant Frank J. Berard, Jr.'s petition for a writ of habeas corpus. The petition was filed on September 9, 1976, pursuant to Title 28, Section 2254, of the United States Code, to obtain relief from confinement pursuant to a judgment of a state court. An evidentiary hearing was held on January 3, 1977. By agreement of the parties, the case was submitted on the transcript of the trial and written and oral arguments of counsel.

Prior Proceedings

On January 19, 1973, after a trial by jury in the Windsor County, Vermont, Superior Court, Berard was found guilty of the first degree murder of Raymond Lestage; he was sentenced to life imprisonment at the state prison. The conviction was appealed to the Vermont Supreme Court challenging (1) the unreasonable restrictions of cross-examination of prosecution witness Linda Badore, (2) the exclusion of Linda Badore's State Mental Hospital records, and (3) the trial judge's admission of purported statements by Berard to Linda Badore that the Lestage killing was his fourth or fifth time "out of the gate" (i.e., his fourth or fifth killing). The Vermont

Supreme Court affirmed the conviction. State v. Berard, 132 Vt. 138, 315 A.2d 501 (1974). Berard then applied to the United States Supreme Court for a writ of certiorari. This petition was denied. State v. Berard, cert. den., 417 U.S. 950 (1974).

Berard next applied for a writ of habeas corpus in the Windsor County Superior Court alleging violation of his constitutional rights in the conduct of the grand jury proceedings. This petition was denied, and upon appeal, this denial was affirmed by the Vermont Supreme Court. Berard v. Moeykins, 132 Vt. 597, 326 A.2d 166 (1974). Berard then applied to the Windsor County Superior Court for a new trial on the grounds of (1) newly discovered evidence (the murder weapon was found to have been used in a killing that occurred after Berard was taken into custody), and (2) the State's use of prejured testimony at the trial (the prosecuting attorney stated to the Vermont Supreme Court that he felt convinced that two of his witnesses were lying). See Plaintiff's Exhibits 3 through 7.¹ This motion was denied. This denial was appealed to the Vermont Supreme Court, which affirmed the lower court decision. State v. Berard, 134 Vt. 220, 356 A.2d 514 (1976).

¹These are exhibits admitted during the Evidentiary Hearing on January 3, 1977.

Berard then filed an application for a writ of habeas corpus in the United States District Court for the District of Vermont. This application was subsequently dismissed without prejudice on October 16, 1974, after Berard escaped from prison. Berard v. Davallou, Docket No. 74-211. The present application for a writ of habeas corpus was filed when Berard returned to custody.

Statement of the Facts

On Sunday morning, August 13, 1972, Raymond Lestage was found dead in a cemetery next to Route 14 in North Royalton, Vermont, the victim of multiple gunshot wounds. Frank Berard and Ray Rebideau were arrested and charged with the murder.

Although many witnesses were called by the State at Berard's trial, virtually the entire case against him consisted of the testimony of one witness, Linda Badore. Linda Badore was in her early twenties at the time of the trial, once divorced, married to an inmate at the State prison, the mother of one child, and at the time of the murder was intimate with Berard. (T-549, 550)² She had been convicted of petty larceny once and had, by her own admission, participated in a burglary with the appellant. (T-735, 746) She admitted that on the night of the killing she agreed to act as a driver for a "job". (T-557, 558, 565). Although she was

²Reference appearing thus are to the appropriate page of the transcript of appellant's trial in state court, Plaintiff's Exhibits 1, 2 and 3.

said to be a very intelligent person, she had a long history of mental and emotional instability, having been hospitalized for mental problems four times since she was sixteen. (T-547, 878, 1186). She had tried to commit suicide three times, had a history of severe problems with alcoholism, antisocial behavior, and constant promiscuous companionship with criminal types. (T-880, 881, 1200-3) According to Dr. William Woodruff, a psychiatrist familiar with her case, she was a "very, very troubled girl ... a very neurotic person ... a very self-dramatic person ... a hysteroid ... a good actress ... a very selfish person." (T-1201)

Mrs. Badore was in the custody of the police from the beginning of the investigation of the killing until the trial. She gave several different accounts of the murder, including testimony at an inquest, a statement to the police, testimony at a grand jury hearing, a deposition, a written account in novel form, and her testimony at the trial. Requests by Berard's attorney for a polygraph test of Mrs. Badore were refused by both the prosecuting attorneys and by the court. (T-542-5)

Badore's testimony at the trial was as follows. In the early morning hours of August 13, 1972, she accompanied Berard, Rebideau and Lestage on a trip from Burlington, Vermont, for Lestage's home in Boston. Berard was driving a blue Lincoln with license plates reading "HO-HUM". They left

the Interstate near Royalton, Vermont, stopping twice a few minutes later. On the second stop, Lestage, while standing outside the car, was shot by Rebideau with a shotgun and was finished off with a pistol and shotgun by Berard. The three then made their way back to Burlington, arriving that afternoon.

Berard's counsel tried to establish that Badore had fabricated the entire story with the aid of newspaper accounts, leading questions by the police, and other sources of information. In attempting to present this defense to the jury, defense counsel not only brought out inconsistencies in Badore's various versions of the crime and the conflicts between her testimony and the physical evidence (see discussion in Part IV of the ARGUMENT, *infra*), but also sought to demonstrate her motive for falsification by cross-examining her on (1) her fears that the police would take away her child (T-882-6; A-6-9)³, (2) her plans to publish a lengthy account of the killing which she had written while in police custody (T-901, 902; A-9-11), and (3) her past fantasies and false accusations involving criminals and criminal activity (T-880, 889; A-4-6).⁴ The trial judge sustained the State's objections to these questions on the grounds of relevancy, materiality, and as beyond the scope of direct and redirect.

³References appearing thus (A-) are to pages in the Appendix of this brief. The portions of the transcript in which the exclusionary rulings appear are set forth in the Appendix.

⁴Mr. Berard has chosen not to pursue on this appeal his Sixth Amendment claim relating to cross-examination about Mrs. Badore's protective custody.

SUMMARY OF ARGUMENT

The star prosecution witness at Berard's trial was his former mistress, Linda Badore. She accused him of a senseless, brutal murder, in testimony distinguished more for its color than its veracity. While defense counsel was able to demonstrate that Badore's testimony at the trial did not mesh with her prior statements or the testimony of other witnesses, the trial judge frustrated the defense's attempts to cross-examine Badore about her motives and biases. Objections to questions about her fears of losing her child to the state, her plans to publish a novel she had written about the killing, and her similar false accusations and fantasies about crime in the past were sustained by the trial judge. These restrictive rulings were violations of Berard's Sixth Amendment Confrontation Clause right to full and effective cross-examination of prosecution witnesses under the standards enunciated by the Supreme Court in Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S. Ct. 1105 (1974).

The District Court's ruling that these matters were "collateral" and "tangential" is contrary to current authority. As questions asked a crucial prosecution witness whose version of the killing was uncorroborated, on matters directly related to the issues and personalities in the trial, that would

directly reflect on Badore's credibility, the cross-examination was particularly relevant, and its restriction denied Berard a fair trial.

The District Court's decision is grounded in the assumption that Berard must demonstrate that he was prejudiced by the trial court's rulings in order to establish a violation of his constitutional rights. However, United States Supreme Court decisions clearly state that a defendant denied the opportunity for effective cross-examination need not prove that he was prejudiced thereby. Brookhart v. Janis, 384 U.S. 1, 17 L.Ed.2d 314, 86 S.Ct. 1245 (1966); Davis v. Alaska, supra. Nevertheless, Berard can establish prejudice to the extent such a demonstration is possible. Without Badore's testimony, the evidence against Berard was purely circumstantial, thus bringing into play the Vermont rule that the State must negative every reasonable theory consistent with the innocence of the accused to sustain a conviction. To escape this onerous burden, and thus make possible a finding of first degree murder, the testimony of Badore was vital. But, her testimony was so filled with inconsistencies and contradictions to other evidence that it must have stretched the credulity of the jury, although in the end they must have believed her. The presentation of her motives for lying might have had a decisive impact in persuading the jury to return a different verdict. The limitations on the cross-examination of Badore thus denied

Berard his Sixth Amendment Confrontation Clause rights to effective cross-examination and his right to a fair trial under the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

I. PETITIONER'S SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN CROSS-EXAMINATION OF PROSECUTION WITNESS LINDA BADORE WAS SEVERELY RESTRICTED ON IMPORTANT MATTERS GOING TO HER BIAS, POSSIBLE PREJUDICE AND HER CREDIBILITY.

The right to a full and thorough cross-examination of adverse witnesses is one of the fundamental guarantees of a fair trial embodied in the Sixth Amendment Confrontation Clause. This right is assured to defendants in the state courts through the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965). The Supreme Court has stated:

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Pointer v. Texas, 380 U.S. at 405.

The efficacy of a thorough cross-examination in "exposing falsehood and bringing out the truth in the trial of a criminal case" is axiomatic. Pointer v. Texas, 380 U.S. at 404. Cross-examination is a defendant's chief weapon for exposing perjured and inaccurate testimony, especially when there are no other witnesses that can affirm or deny such testimony. Thus, "a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude." Brookhart v. Janis, 384 U.S. 1, 3, 16 L.Ed.2d 314, 86 S.Ct. 1245 (1966).

To violate the fundamental right to cross-examine it is not necessary that there be a total denial of any opportunity for cross-examination. Rather, the restriction of cross-examination is by itself a violation of the Sixth Amendment guarantees and requires the reversal of a criminal conviction. Davis v. Alaska, 415 U.S. 308, 39 L.Ed2d 347, 94 S.Ct. 1105 (1974); Smith v. Illinois, 390 U.S. 129, 19 L.Ed.2d 945, 88 S.Ct. 748 (1968); Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965).

Attacking the credibility of a witness is, of course, one of the principal functions of cross-examination, and as such is entitled to constitutional protection.

∟ C ∟ Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Davis v. Alaska, 415 U.S. at 316.

And, an important attack on credibility is directed to the witness' motivation:

∟ T ∟ The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Davis v. Alaska, 415 U.S. at 316.

The Supreme Court in Davis stressed the importance of cross-examination aimed at revealing "possible biases, prejudices, or ulterior motives of the witness". Davis v. Alaska, 415 U.S. at 316. Their conclusion was thus that:

∟ D ∟ Defense counsel should have been permitted to expose to the jury the facts from which jurors,

as the sole triers of facts and credibility, could appropriately draw inferences relating to the reliability of the witness. Davis v. Alaska, 415 U.S. at 318.

The crucial prosecution witness in Berard's trial was Linda Badore. She was a purported eyewitness to the slaying and her account of the killing could not be corroborated by other persons. Her testimony was that Lestage was shot by Ray Rebideau and "finished off" by Frank Berard. Given the extremely damaging nature of this testimony and Badore's vulnerability to charges of bias, a thorough cross-examination was vital. Yet, at Berard's trial, defense counsel's repeated attempts to question Badore about her motives for testifying, her possible biases, and her credibility were thwarted by the trial court. The trial court repeatedly sustained objections by the prosecution to questions about Badore's possible fears that the state would take her child away from her, her possible financial stake in petitioner's conviction because of her plans to publish a novel about the killing, and her past false accusations and fantasies about crime. These rulings were a severe restriction of appellant's Sixth Amendment right to cross-examination of this witness. Thus, under the standards established by the Supreme Court, Berard's trial did not comport with constitutional requirements of due process and a fair trial.

A. Trial Court's Refusal to Allow Defense Counsel to Elicit Information about Badore's Fears that the State Might Take her Baby Away Was a Violation of Berard's Sixth Amendment Right to Effectively Cross-examine Badore.

Badore had one child who was three months old at the time of the Lestage killing and eight months old at the time of the trial. (T-883, 4). At the trial, defense counsel attempted to cross-examine Badore on whether she was afraid that the police would take away her child. (T-882-6; A-6). Defense counsel hoped to show "the potential motive of why this young lady would fabricate the entire story". (T-885; A-9). Certainly, a demonstration of such motivation would give rise to an inference that Badore might tailor her testimony to please state authorities, thus severely undermining her credibility. But, the trial court sustained the prosecution's objections to such questioning.

The District Court's assertion that "there is not the slightest indication in the record that the State of Vermont or any of its agencies threatened the witness with loss of custody" is precisely what Berard here complains of. (A-20). Defense counsel's attempts to question Badore about the complaint her mother filed with the police because of Badore's treatment of the baby were blocked by the court. (T-885; A-8). Presumably, the police in some way followed through on this complaint. When and in what manner this situation was resolved,

especially if it occurred while Badore was in protective custody, would have demonstrated her vulnerability to police pressure and explain her desire to cooperate with the police, even to the extent of perjuring herself.

As a matter bearing on the credibility of the witness,

. . . the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on /the witness'/ testimony . . . Davis v. Alaska, 415 U.S.A at 317.

At Berard's trial, because of the judge's restrictive rulings, the jurors were not presented with the facts to support the defense theory. Yet here, as in Davis, the witness had a "vulnerable status": in Davis, the witness was on probation; here, the witness may have feared that the state would take away her child. In both instances, this vulnerable position would afford the basis for an inference that the testimony given was the result of "undue pressure". 415 U.S. at 318. Berard, like Davis, was thwarted in his attempts to present such a theory to the jury. And Berard, like Davis, was thus denied his Sixth Amendment right to effective cross-examination.

The questions defense counsel was allowed to ask were not sufficient to adequately present this defense to the jury. As in Davis,

. . . on the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative

and baseless line of attack on the credibility of an apparently blameless witness. 415 U.S. at 318.

The jury could only have been confused by the references to the child and could not properly have concluded, from the scanty facts elicited, that Badore was concerned about losing her child. Thus, defense counsel was not, as Davis requires, "permitted to expose to the jury the facts from which jurors, as the sole triers of facts and credibility, could appropriately draw inferences relating to the reliability of the witness." Therefore, the trial court violated Berard's Sixth Amendment Confrontation Clause rights to effective cross-examination.

B. Trial Court's Refusal to Allow Defense Counsel to Ask Mrs. Badore about Possible Plans to Publish a Lengthy Written Account of the Crime Deprived Berard of his Sixth Amendment Right to an Opportunity for Effective Cross-examination.

Linda Badore, while in police custody, had written a ninety-six page account of her version of the crime. (T-632, 901; A-10). While she was on the witness stand, defense counsel asked Badore whether she had ever had any conversations with anybody about the possibility of publishing this statement. (T-902; A-10). The Court sustained the State's objection to this question. The refusal of the Court to allow Berard to develop this line of questioning denied him the opportunity to show that Badore's motive for testifying was her hope to publish her story and that she might thus profit financially

from Berard's conviction. This motive would directly reflect on her credibility. The jury could infer from such attempts to publish an account of the crime that Mrs. Badore would "glamorize" and elaborate upon the true facts in an attempt to create a more exciting novel. Certainly her testimony, with the gangster slang, the threats, the sex, the violence, etc., would be more appropriate in a cheap paperback than in a courtroom. Or, the jury could infer that Badore would feel her story would sell better with a convicted murderer to lend it credence, and that she thus had a financial stake in Berard's conviction. In either case, evidence of a hope to publish this statement would support the defense theory that her testimony was indeed fiction rather than fact.

The District Court's statement that "The theory of the defense that the witness had undertaken to write a novel about this gruesome experience was persistently driven home to the jury" is not supported by the trial transcript. (A-21). The prosecution referred to it as a statement, as did Badore, the implication being that it was a statement made to the police. (T-894). Though defense counsel referred to it as a novel, this hardly provided an evidentiary basis from which the jury could draw inferences. The trial judge of course charged the jury that statements of attorneys during the course of the trial were not evidence and "will not be considered as such by you". (T-1330, 1331). Thus, the jury would have been

derelict in its duty had it considered the statement to be a novel or considered Badore's financial stake in Berard's conviction in assessing her credibility, in the absence of any evidence supporting such an inference, and defense counsel would have been improper for raising it in his final argument in the absence of any facts in the record to sustain it. See State v. Lapham, _____ Vt. _____, _____ A.2d _____.

(Feb. Term 1977, No. 132-76) ("Counsel should confine arguments to the evidence of the case and inferences properly derived from it.")

Again, as a matter affecting the credibility of a crucial witness, Berard had a constitutional right to demonstrate that an improper motive prompted Badore's testimony:

. . .the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Davis v. Alaska, 415 U.S. at 316.

Under Davis v. Alaska, supra, the jury was entitled to the benefit of this theory, which would seriously impugn Mrs. Badore's reliability, for purposes of deciding what weight to put upon her testimony.

C. The Trial Court's Refusal to Allow Defense Counsel to Question Mrs. Badore about her Former False Accusations and Fantasies Involving Criminal Activities Deprived Berard of his Right to an Opportunity for Effective Cross-examination.

The defense assailed Linda Badore's incriminating testimony by attempting to elicit evidence that her account of the murder was just another instance in her long history of fabricating spectacular tales, especially about incidents involving crimes. Defense counsel, in pursuit of this line of defense, asked Badore about other false accusations she had made, statements to hospital authorities that she had been carried off by racketeers and gangsters, and tales of former threats by people with pistols and guns. (T-880, 889; A-4-5). The trial court refused to allow these questions.⁵ This ruling deprived Berard of an opportunity to develop an important defense through cross-examination. Coupled with the great number of inconsistencies in Badore's stories about the murder, the evidence about her psychiatric history, and the psychiatric evaluation of her as a troubled neurotic and a good actress, an admission of her tendency to fantasize about criminals and crime would have had great relevance to the credibility given to her testimony at the trial. The jury

⁵Also excluded were Badore's State Mental Hospital records (T-1213) and a question to psychiatrist William Woodruff concerning the role of fantasy in people of Mrs. Badore's mental makeup. (T-1205).

could have inferred from an affirmative answer to the questions that Linda Badore frequently made up stories, that she was a woman who had a long history of fantasizing about crime, and that her testimony at the trial was the culmination of this pattern.

The cross-examination allowed about Badore's general psychiatric problems and the testimony of psychiatric experts was not an adequate substitute for evidence that she consistently lied and that her lies generally involved criminal activity and threats. Although there was evidence of her acquaintance with criminals, the particular manifestation of her illness that counsel was trying to elicit -- her fantasies about being threatened and abducted, about other criminal activity and about false accusations -- was not presented to the jury by the introduction of evidence, either through cross-examination of Badore or testimony about her. (T-1203).

Certainly, no evidence could have a more damning impact on a witness' credibility than that she is a habitual liar and that her current testimony bears a remarkable resemblance to past stories. Yet again, this vital avenue of cross-examination was blocked by the trial court, thus leaving defense counsel with no factual basis from which to support the argument that Badore's lies stemmed from her mental illness. Such a restriction was a "constitutional error of the first magnitude"

Brookhart v. Janis, 384 U.S. at 3; Davis v. Alaska, 415 U.S.
at 318, and deprived Berard of a fair trial.

II. THE EXCLUDED QUESTIONS TO A CRUCIAL PROSECUTION WITNESS ON MATTERS OF CREDIBILITY DIRECTLY AFFECTING ISSUES AND PERSONALITIES AT TRIAL WERE NOT COLLATERAL OR TANGENTIAL.

The cardinal purpose of cross-examination is to test the credibility of an adverse witness. We would not dispute that Berard's counsel was "unrelenting in delving into the witness' story and testing her perceptions". (A-24). But, a challenge to credibility involves more than testing perceptions and memory. With a lying witness, it is essential to establish a motive for perjury; to point out inconsistencies in testimony is hardly sufficient to convince a jury that a witness is lying, for the question always remains, "But why would she lie about it?" If there is no answer, the jury will reasonably infer that these were innocent slips of memory, especially where, as here, the trial judge instructed the jury that it was better to reconcile inconsistencies. Thus, defense counsel sought to expose the motivation of Badore for lying, i.e., to mollify state authorities, to better sell her novel, or as a manifestation of her mental illness.

Yet, the District Court held that the exclusionary rulings concerned "collateral" and "tangential" matters and that counsel's inquiries were "remote, repetitive, or harassing". (A-25). This is directly contrary to the Supreme Court's ruling that matters going to the motivation and bias of a witness are especially pertinent:

A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence s. 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Davis v. Alaska, 415 U.S. at 316.

Clearly, then, the right to cross-examination is not limited to questions about perceptions or memory, but also includes questions going to bias and motivation. Thus, these cannot be "collateral" or "tangential" matters. See, United States v. Harvey, 547 F.2d 720 (CA2, 1976).

The District Court also stated:

The total cross-examination was entirely adequate to afford the jury a basis to properly appraise the witness' motivation and to evaluate the theory of the defense that her testimony was not worthy of belief. See, United States v. Ong, 541 F.2d 331, 342 (2nd Cir. 1976); United States v. Campbell, 426 F.2d 547, 550 (2nd Cir. 1970). (A-25, 26).

Here again, the implication is that these questions were not directly related to Badore's credibility. In dealing with the right to cross-examination, where the defendant need not prove prejudice, (See Part III of Argument, infra) there obviously must be some standard to separate those cases in which the restrictions resulted in the deprivation of a fair trial from those cases where they did not. One solution is to

require that the witness be one whose testimony is important to the prosecution's case. Thus, Supreme Court decisions involve testimony that is "a crucial link in the proof of the Petitioner's act," Davis v. Alaska, 415 U.S. at 317; Douglas v. Alabama, 380 U.S. 415, 419, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965); or "uncorroborated" evidence of "a damaging character". Alford v. U.S., 282 U.S. 687, 692-3, 75 L.Ed. 628, 51 S.Ct. 218 (1931). This standard is clearly satisfied here, as Badore was a purported eyewitness to the killing.

Another possibility is insisting that the questions concerning the bias and motivation of the witness relate directly to the issues or personalities in the case at hand. See, Davis v. Alaska, supra. This is the approach adopted by the Second Circuit Court of Appeals in United States v. Ong, 541 F.2d 330, (CA2 1976) from which the quotation of the District Court is derived. In that case, the defendants were charged with bribing an Immigration and Naturalization Service agent. Defense counsel attempted to cross-examine the agent on his inquiries to the defendant about whether a co-conspirator dealt in narcotics. The defense theory was that if the witness' responses were affirmative, the jury could infer an attempt to coerce the defendants into a narcotics scheme, from which it could infer that the agent coerced the defendants into a bribery scheme, all in the face of tape recorded conversations

in evidence of transactions between the agents and defendants. The Court found that, "We do not believe that the Court in Davis meant to sanction speculative expeditions into areas only tangentially related to the facts in issue in the hope that some basis for implying an ulterior motive might be found." 541 F.2d at 342. The test the District Court has taken from that opinion, that "the total cross-examination was sufficient to afford the jury a basis to evaluate the defense theory", was referring to the questioning "at length" that the trial court had allowed into the issue of whether the bribery scheme was coerced by the INS agent, which was a question of credibility directly related to the issues in the case.

Thus, Onq stands for the proposition that there is no constitutional error if the matters on which questions were prohibited were tangential to the issues at trial. Berard is a totally different case. Here, the areas which defense counsel sought to explore and the theories he wished to present directly reflected on the credibility of the witness. The jury would not have had to pile inference on top of inference to deduce that because Badore had made false accusations in the past she might be lying on the witness stand, or that if she was afraid the state would take away her child she might try to mollify state authorities by delivering a convicted murderer

into their hands, or that she had mixed fantasy with fact as a result of her attempt to write a novel about the killing. As the trial court permitted no cross-examination on these matters, the application of Ong , where cross-examination was allowed, is inapposite.

The above quoted test used by the District Court was also derived from United States v. Campbell, 426 F.2d 547, (CA2 1970). In that case, Judge Hays stated:

In determining whether the trial judge has abused his discretion in limiting the introduction of such evidence, the issue is whether the jury was otherwise in possession of sufficient information concerning formative events to make a "discriminating appraisal" of a witness' motives and bias. 426 U.S. at 550.

Both United States v. Campbell, and the case from which this test is derived, Gordon v. United States, 334 U.S. 414 at 417, 73 S.Ct. 369 at 372 (1953), are criminal appeals from United States District Courts. No constitutional question was raised in either of these pre-Davis cases and, as the above quotation demonstrates, this standard is a measure of abuse of discretion when the restrictions are not of constitutional dimension. We believe Judge Holden was correct when he stated:

The court's concern is not whether the trial court committed evidentiary error in excluding the particular questions asked of the witness Badore by defense counsel. The ultimate and controlling question is whether the exclusions violated the Confrontation Clause of the Sixth Amendment within

the meaning given in Davis v. Alaska, supra, 415
U.S. at 315. (A-23).

and that the District Court's use of the Campbell test is
inappropriate. As discussed above, under Davis standards,
Berard's Sixth Amendment rights were violated.

III. THE DISTRICT COURT ERRED IN REQUIRING DEFENDANT TO ESTABLISH PREJUDICE.

The posture of the District Court is that the restrictions on cross-examination of Linda Badore resulted in no prejudice to Berard. For, the Court stated:

The total cross-examination was entirely adequate to afford the jury a basis to properly appraise the witness' motivation and to evaluate the theory of the defense that her testimony as not worthy of belief. (A-25, 26).

And, more explicitly:

The court's reading of the extensive record fails to indicate that any of the exclusionary rulings directly affected the guilt or innocence of the accused. (A-25).

This standard is in direct conflict with prevailing authority. The United States Supreme Court decisions upholding the Sixth Amendment Confrontation Clause right of effective cross-examination have consistently maintained that the defendant does not have to demonstrate that he was prejudiced by the limitations on cross-examination. Thus, the Court in Brookhart v. Janis, stated:

If there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice could cure it. 384 U.S. at 3.

This is also the rule where there are restrictions on, rather than a complete denial of, the right of cross-examination. Davis v. Alaska, 415 U.S. at 318.

The exploratory nature of cross-examination mandates such a rule. To require the defendant to demonstrate not only the facts he would have elicited had cross-examination been allowed, but also that had these facts been exposed the jury would not have convicted him, is to set him an absurdly impossible task. Thus, the Supreme Court has stated that the defendant does not have to demonstrate the facts he hopes to elicit:

It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts, tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.⁶ Alford v. United States, 282 U.S. at 692.

Neither does the defendant have to demonstrate that the verdict would have been different had the questions been allowed:

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But, we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on the witness' testimony which provided "a crucial link in the proof . . . of petitioner's act." Davis v. Alaska, 415 U.S. at 317.

⁶Although the Court in Alford did not state that its holding was grounded in the Sixth Amendment Confrontation Clause, "the constitutional dimension of the holding in Alford is not in doubt." Davis v. Alaska, 415 U.S. at 318 fn. 6.

The fact situation in Davis demonstrates the correct application of this rule. In that case, the crime charged was theft of a safe. The evidence against Davis consisted of paint chips that "could have come" from the stolen safe and safe insulation that did match the insulation of the stolen safe found in Davis' car, and the identification of Davis by a witness, Green, as being on the spot where the safe was later found. Defense counsel sought to establish Green's lack of credibility by questions relating to his juvenile probationary status, but the trial court prohibited those questions. Green did admit on the stand that it had occurred to him that the police might have thought that he had something to do with the crime. In this situation, where there was physical evidence implicating the defendant and the witness' own admissions on the stand provided a basis for inferring bias, the Supreme Court found that the trial judge's refusal to allow cross-examination on the witness' probationary status was a violation of Davis' constitutional rights. The Court insisted that counsel be allowed "to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial" and "to expose to the jury the facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness". 415 U.S. at 318. Since this was not allowed by the trial court,

the Court found that "petitioner was thus denied the right of effective cross-examination, which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" 415 U.S. at 318.

The District Court, by requiring Berard to show prejudice, thus used an erroneous standard to determine whether the restrictions on cross-examination were of constitutional dimension. For, under Davis, if the witness is a crucial one, as Badore was here, and the attempted cross-examination is on matters directly relating to credibility, as the questions to Badore were, the defendant does not have to demonstrate prejudice to establish a violation of his Confrontation Clause rights.

IV. BERARD WAS PREJUDICED BY THE TRIAL COURT'S RESTRICTIVE RULINGS, WHETHER OR NOT IT IS NECESSARY TO PROVE PREJUDICE.

As far as it is possible to demonstrate prejudice, Berard can show that the trial court's restrictions on the cross-examination of Mrs. Badore were prejudicial, whether he is required to prove it or not. Certainly Berard cannot prove that Badore would have responded truthfully to questions about her motives for testifying or, if she had lied, what evidence might have been introduced to impeach her denials. But, it is manifest from a review of the transcript that the evidence was insufficient to convict Berard of first degree murder without Badore's testimony, and that Badore's testimony was filled with contradictions and conflicts with other evidence, making it patently unreliable.

For Berard to be convicted of first degree murder, the State had to prove that he killed Lestage and that the killing was done with malice, premeditation and deliberation. 13 V.S.A. § 2301 ("Murder committed ... by wilful, deliberate and premeditated killing ... shall be murder in the first degree."); State v. Battick, 133 Vt. 558, 349 A.2d 221 (1975) (malice is essential element of murder). Linda Badore's testimony was the crucial evidence supplying the State with this proof. She testified that she was with Berard from the night before the killing until the next evening, and that during that time she was an eyewitness to the murder.

Without her testimony, there was no evidence that Berard participated in the killing, or, if he had, what role he played, or that it was a first degree murder. Thus, incredible as her testimony seemed, the jury believed Linda Badore.

The decision of the jury to credit Badore's testimony must have been a close one. Her story conflicted with her prior statements, the evidence of other witnesses, and expert testimony. Although her story at the trial was still inconsistent with other witness' testimony, it had obviously been "improved" and polished since her earlier statements made at the inquest and before the grand jury, thus supporting the defense's theory that she had put her story together with the aid of newspaper accounts and leading questions from the police.

Mrs. Badore's account of the murder begins at a Burlington cafe, Jim's, on the night preceding the murder. There she had met and spoken with Frank Berard and Raymond Lestage. The prosecution presented two witnesses who testified about an offer by Berard to take Lestage to Boston. These two witnesses, Badore and Alfred Anderson, the bartender at Jim's, told stories that differed in every particular. Anderson stated that Badore came into Jim's at 5:00 or 6:00 and stayed until 11:00. (T-170) Badore, on the contrary, stated that she arrived at Jim's at 7:30 and left at one point to make a phone call across the street. (T-639, 648-9). Anderson stated that Frank Berard came in with a friend (meeting Ray Rebideau's

description) at 7:30. (T-168) Badore stated that when she arrived at Jim's Berard was already there and that Ray Rebideau did not come in until Berard returned at 11:00. (T-643, 670) Anderson's and Badore's versions of the ride offer differed substantially. Anderson stated that Berard offered Lestage a ride, saying that his Oldsmobile would not start and that he thus would have to pick up his Lincoln. (T-171) Badore's version of this conversation was that Berard just said he would give Lestage a ride to Boston and that she would go along. (T-554, 650, 651, 652) She further testified that Berard owned only two cars, a Cadillac and a Pontiac. (T-679) And, more significantly, Badore had testified at the inquest that the ride to Boston was offered at the VFW Club later that night, not at Jim's. (T-661, 854)

Anderson stated with some certainty that Berard did not give Lestage a ride to the VFW, that Lestage took a cab. (T-179) Badore, however, before the grand jury and in her novel, stated that Frank Berard had told her at Jim's that he was taking Lestage to the VFW Club. (T-741) She then tried to change this testimony at the trial by insisting, until cross-examined, that she was "positive" that Berard did not offer Lestage a ride anywhere at Jim's. (T-660, 741)

According to all testimony, Berard left Jim's at about 8:00 and returned later in the evening. According to Badore, she, Berard and Rebideau then left for the VFW, stopping at an apartment along the way to pick up a pistol and shotgun.

(T-563-6) Badore had various accounts of where the shotgun was put in the car. (T-687, 688, 694-6) At the deposition, she stated that she did not know where Berard was carrying the pistol, but she changed this testimony at the trial to say that he was carrying the pistol in his belt at that time. (T-567, 689, 690). At the deposition, Badore could not remember what the pistol looked like, but at the trial she was suddenly able to positively identify it. (T-569, 689, 690, 693-4). And, Badore had testified at the inquest and in the deposition that she did not know of the pistol before they left the VFW later that night, making it impossible for her to know where it was carried or to identify it. (T-726-9)

From the apartment, they then drove to the VFW Club. Badore testified that at the VFW she danced with Deputy Sheriff Ray Williams (her ex-father-in-law), and that she did not see her sister there. (T-701-2). Deputy Sheriff Williams stated that he did not dance with Badore and that she came in with her sister. (T-479, 482). Badore related an incident at the VFW when she asked Berard to dance with her and he refused, saying he had just dropped his gun and was afraid of dropping it again, but later did dance with her. (T-703, 728, 731) Yet Roger Caise, Chairman of the Bar Committee at the VFW, testified that immediately after Berard dropped a gun he requested him to take it out of the building, which Berard did, so that he could not have had a gun with him when Badore asked him to dance. (T-291) At the trial, Badore

initially stated that she did not remember whether Raymond Lestage left the VFW with her, Berard and Rebideau, but later she "remembers" that they met him in the parking lot. (T-573, 706, 709). This change was obviously necessary to accord with testimony that Raymond Lestage left the VFW Club a half hour before Berard. (T-293).

After leaving the VFW Club, according to Badore, they headed south on the Interstate. At the inquest, in response to question by the judge, Badore stated that she did not remember going by a store called Gaynes when getting on the Interstate, yet at the trial she testified that they did go by Gaynes. (T-709, 710) At the inquest, Badore omitted any mention of Lestage making passes at her while they were driving south and, on the contrary, stated that he was sleeping and woke up suddenly when they stopped at the cemetery. (T-856, 857, 753-755). Yet at the trial, she elaborates greatly upon Lestage's advances during this time. (T-715, 720-5)

According to Mrs. Baodre, they left the Interstate at some point, stopped, and then travelled another two minutes and stopped at the cemetery where Lestage was supposedly killed. (T-864-5) At the inquest, she had stated that their second trip was ten minutes. (T-864) Her shortening of this period at the trial was necessary to accord with testimony of Susan Vesper that the Interstate exist was only a one minute drive from the cemetery. (T-926)

Badore testified that at the cemetery, Lestage announced that he had to "take a leak", that he got out of the car and had sufficient time to urinate before he was shot. (T-760) But, the autopsy revealed that he had about 300cc of urine in his bladder, and the pathologist testified that if he had just urinated he would only be expected to have 10-20cc. (T-396-7). Badore's testimony at the trial was that Rebideau first shot Lestage in the back with a shotgun from inside the car. (T-580) At the inquest, she stated that the noise from this shot was not very loud, and at the trial she testified that it made a loud crack. (T-761). Ballistics expert Francis Killay testified that the noise of a shotgun would be a loud roar, and that a rifle sound would be more like a crack. (T-1060, 1078) Badore changed her testimony from the version she gave at the inquest with respect to statements made by both Berard and Lestage at the time of the shooting. (T-857, 858, 867, 868). She also changed her testimony with regard to whether or not Berard had a pistol in his hand at the cemetery (T-866, 869) and as to whether or not she saw Lestage on the ground after he fell. (T-766-8, 780, 869-70)

According to Badore, Lestage was alone outside the car when he was shot. (T-580). She testified that Berard got out of the car after the first shot, and after speaking a few words to Rebideau, disappeared into the cemetery after Lestage, and at that time she heard some more shots. (T-582) At that time, and throughout the incident, she said that she remained

inside the car with Rebideau, and that the light inside the car was on. (T-581, 780) She stated that Berard then returned to the car, asked Rebideau for the shotgun, and told her to drive down the road, turn around, and pick him up. (T-583). It is impossible to reconcile this story with the testimony of two young women, Nancy Brown and Janet Luce, who passed by the cemetery several times in the early morning hours of August 13. Brown said that she saw three or four men standing outside the car at the time that she heard sounds like firecrackers. (T-930-3) She further stated that when they passed by the cemetery again shortly thereafter, she saw three or four men still standing outside the car. (T-929, 932). Mrs. Luce also testified that she had seen three men standing outside the car, that she heard loud bangs, and that when they later passed the car she saw three men getting into the car and pulling out. (T-936, 938-9). She further testified that there were no lights on in the car. (T-938)

Badore's version of the killing was also at odds with testimony by medical experts about Lestage's wounds. Badore stated that Berard told her that Lestage was looking at him when he shot him in the head with a shotgun. (T-590) But, the testimony of the doctor who did the autopsy on Lestage indicated that the wound was from the back of the head toward the front. (T-340, 341) Also, Badore testified that Lestage was first shot by Rebideau through the car window while standing with his back to the car. (T-580) But, expert testimony indicated that this wound to the shoulder was

caused by a shotgun that was fired at a distance of 5 to 7 feet, that the wound was at a 45% or greater vertical angle to the back, and that thus a person sustaining such a wound would either had to have been lying down or leaning at a 45% angle. (T-341, 387, 394, 1090) There were a series of wounds to the decedent's penis that could not be satisfactorily explained by the experts in accordance with Badore's version of a killing in the cemetery. Alternate speculations that they were caused by 4 pellets ricochetting off a tombstone or by one pellet deflecting from the other wounds and skipping down the penis were contradicted by evidence that there were no ricochet marks found on the tombstones or stray pellets found near the body. (T-262, 370, 454, 1163-8). The pathologist found these wounds to be consistent with torture, something which could not have occurred within the time frame provided by Badore. (T-282)

Further expert testimony contradicted Badore's assertion that Lestage was killed in the cemetery. Experts concluded that, especially with the shotgun wound to the head, one would expect to find quite a spattering of blood and tissue around the body. (T-229, 239, 253, 254, 363). Yet those who investigated the scene indicated that, with the exception of the blood that had drained directly under the body, there were only a few drops of blood around the body. (T-119, 138, 144, 218, 245, 318, 455, 456) Also, the area was examined with a metal detector and no stray shotgun pellets were found. (T-454)

According to Badore's version of the killing, Ray Rebideau remained in the car the entire time they were in the cemetery. (T-578-586). Yet, when they stopped for pizza in their travels after the killing, Badore has Rebideau say that the pizza looked just like Raymond Lestage's brains in the cemetery. (T-607). She also testified at the trial that she did not know they were next to a graveyard until Rebideau mentioned it in connection with the pizza; yet at the inquest she had stated that Frank Berard had mentioned it when he returned to the car after shooting Lestage. (T-752, 753, 858, 859)

Badore testified that after they left the cemetery, they travelled along the border towns of Vermont and New Hampshire, and then returned to Burlington. She stated at the inquest that Lestage's suitcase was thrown out of the car after they left Claremont, New Hampshire (some 50 miles southeast of Royalton). (T-863) She later changed this testimony to say that the suitcase was thrown out before they reached Bellows Falls, Vermont (some 65 miles south of Royalton), (T-591) A suitcase was actually recovered near the Queechee exit by White River Junction, Vermont, about 10 miles from Royalton. (T-994) Badore also testified at the inquest that during their travels, Berard mentioned that he should call Peter Brown, the owner of the car, and tell him not to report the car stolen. (T-609, 749, 844). Yet, she later contradicts this testimony by saying she was never told the car was stolen. (T-748)

The state put on many witnesses in support of Badore's version of their travels after the killing. None of these witnesses identified Berard as the person they had seen (though three were police officers) and none connected the persons they had seen with a Lincoln with HO-HUM registration. (See testimony of several witnesses, T-946-990) Especially telling is the testimony of a police officer, Robert Couitt, who testified that he saw a car parked in a bank parking lot at Claremont, as Badore had testified they were, and had noticed that there were Vermont license plates on the car, but did not notice a HO-HUM number. (T-962, 970, 971) Thus, the only witnesses who connected Berard with the car with the HO-HUM plates were Badore, the owner of the car (Peter Brown), and Badore's roommate (Darlene Ferrier), hardly "disinterested and unimpeachable" witnesses. (A-23)

One of the most significant gaps in Badore's testimony and the prosecution's case was the entire absence of any motive for the killing. Rather, Badore testified that Lestage was a friend of Berard's of twenty years standing. (T-796) In addition, the evidence that came to light after the trial, that the murder weapon had been used in another killing while Berard was in custody, along with the prosecuting attorney's admissions that he felt that Blanchard and Bartlett, the witnesses who testified about finding the gun, were lying, also tends to exculpate Berard.

In total, the evidence against Berard was far from conclusive. The only evidence besides Badore's which implicated Berard in the murder was (1) the testimony of Peter Brown, owner of the blue Lincoln with the HO-HUM plates that Berard had asked to borrow the car (although the date Berard was to borrow the car was unclear, T-416, 418, 433, 434) and that he (Brown) thus left it outside with the keys in it, (2) the statements of Alfred Anderson (discussed earlier) that he overheard Berard offer Lestage a ride to Boston, (3) the statements of the two women who drove by the cemetery that they saw a car with HO-HUM or HOH plates parked there, (4) the testimony of Darlene Ferrier (Badore's roommate) that on the afternoon of August 13, Rebideau, Berard and Badore came to her apartment and told her to look at the license plate of their car, which read HO-HUM, and (5) the testimony that Berard was seen with a gun on the night before the murder.

This evidence was entirely circumstantial, and, under established Vermont law, is not sufficient to support a finding of first degree murder. Vermont follows the rule that for a conviction on a criminal charge when the evidence is entirely circumstantial, as is the above evidence, every reasonable hypothesis except that the defendant is guilty must be excluded; or, as sometimes expressed, such evidence must be so cogent as to exclude every reasonable theory consistent with the defendant's innocence. State v. McCann, 133 Vt. 288, 336 A.2d 190 (1975); Woodmansee v. Toneman,

133 Vt. 449, 344 A.2d 26 (1975); State v. Bruce, 126 Vt. 367, 231 A.2d 107 (1967); State v. Clark, 118 Vt. 131, 101 A.2d 868 (1954); State v. Baker, 115 Vt. 94, 53 A.2d 53 (1947), State v. Levy, 113 Vt. 459, 35 A.2d 853 (1944); State v. Goodhart, 112 Vt. 154, 22 A.2d 151 (1941); State v. Boudreau, 111 Vt. 351, 16 A.2d 262 (1940); State v. Foss, 110 Vt. 453, 8 A.2d 648 (1939). This is part of the State's burden. On the basis of the above evidence, the State would have had to exclude all reasonable explanations that were inconsistent with Berard having killed Lestage, e.g., that someone else took the car, killed Lestage, and returned the car to Brown's where Berard picked it up on the afternoon of August 13; that Berard picked up the car but loaned it to someone else before the murder; etc. If the State was not able to negative these possibilities, it could not have escaped a directed verdict, much less have proved Berard guilty of the first degree murder of Lestage beyond a reasonable doubt.

Thus, the prosecution's case rested on the testimony of Linda Badore, which, replete with contradictions, was manifestly unreliable. A chance to further undermine this testimony by presenting Mrs. Badore's motives for lying, and the cumulative exposure of many possible areas of bias, might have been the decisive factor in persuading a jury to bring in a different verdict.

In summary, although appellant maintains that he does not have to show that he was harmed by the trial court's

restrictive rulings, he can demonstrate prejudice. And, such demonstration clearly focuses the constitutional infirmity of the trial court's exclusions. As stated by the Sixth Circuit Court of Appeals:

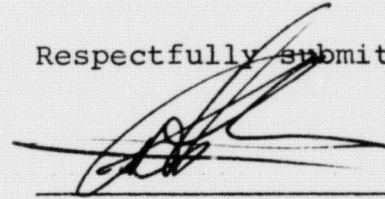
. . . when the government undertakes a prosecution in which it relies primarily on the evidence of a witness who is vulnerable to claims of bias, interest, or lack of credibility, the prosecution rather than the defense must bear the onus of this circumstance. United States v. Garrett, 542, F.2d 23, 27 (CA6 1976).

The trial court's attempts here to protect Badore from inquiries directed at exposing her lack of credibility denied Berard the fair and impartial trial that is the very essence of due process.

CONCLUSION

For the foregoing reasons, the judgement of the District Court should be reversed, with directions to enter a judgement granting a writ of habeas corpus to the appellant.

Respectfully submitted,

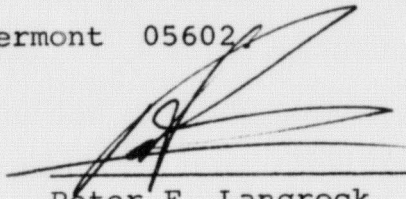


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed postage prepaid, this 18th day of May, 1977, to Paul F. Hudson, Esquire, Attorney General's Office, Montpelier, Vermont 05602, and to William T. Keefe, Esquire, Attorney General's Office, Montpelier, Vermont 05602.



Peter F. Langrock, Esquire
Attorney for Appellant,
Frank J. Berard, Jr.

APPENDIX

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DIST/OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	23	\$	OTHER	NUMBER	DEM.	YR.	NUMBER
210-2	76	199	09	09	76	3	530	1				See below	1006		76	199

PLAINTIFFS

BERARD, FRANK

DEFENDANTS

VS. STONEMAN, KENT, Commissioner,
Department of Corrections

CAUSE

Petition for Writ of Habeas Corpus

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☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	OCT 5 1976
				JS-6	APR 5 1977

DATE 1976	NR.	PROCEEDINGS
Sep. 9	1	Filed Petition for Writ of Habeas Corpus and Forma Pauperis Affidavit
" 14	2	" Order -- pltf. may proceed in forma pauperis. Mailed copy to parties and U. S. Marshal.
" "		Issued Order to Show Cause returnable 9-27-76 and delivered same to Marshal for service.
Sept 23	3	Filed Defendant's motion to dismiss petition for writ of habeas corpus
" "	4	Filed Memorandum in support of motion to dismiss writ of habeas corpus
Oct 5	5	Filed Order to show cause returned served.
" 15		In open Court before Judge Holden. John Stahl, Esq., for Plaintiff; Michael Sheehan, Esq., for Defendant.
" "		Hearing on Defendant's Motion to Dismiss.
" "		Statements made to Court by Mr. Sheehan, followed by Mr. Stahl, further followed by Mr. Sheehan, Mr. Stahl.
" "		Attorneys given until Oct. 22, 1976, to file memorandum of law.
" "		Decision reserved.
Oct 26	6	Filed memorandum in support of Petitioner's application for writ of Habeas Corpus
Dec. 7	7	Filed Notice of appearance of Paul F. Hudson, Esq. and Wm. T. Keefe, Esq., for defendant.
" 17		Status Conference scheduled for 12-17-76, was rescheduled for week of 12-27-76.
" 23	8	Filed Pltf's Objection to appearance of William Keefe as atty. for deft.
" 27		In Chambers before Judge Holden. Peter F. Langrock, Esq., attorney for plaintiff; William Keefe, Asst. Atty. General, State of Vermont.
" "		A status conference was held in chambers between the Court and Counsel
" "		In open Court. Counsel present. It was agreed by counsel that the original transcript in the State murder proceedings is unaccounted for and that a copy of said transcript in the possession of the State Attorney General is available without further authentication. The Court will receive said transcript at the evidentiary hearing scheduled for January 3, 1977, at 2:00 P.M. Memorandum of law are to be filed by counsel on or before January 3, 1976.
1977		
Jan. 3		In open Court before Judge Holden. Peter Langrock, Esq., for Plaintiff; William T. Keefe, Esq. and Paul F. Hudson, Esq., for Defendant.
" "		Evidentiary Hearing held.
" "		Statements made to Court by Mr. Langrock re: Plaintiff's position in this matter, followed by Mr. Keefe.
" "		Mr. Langrock moves the admission of plaintiff's exhibits for identification 1 through 7., followed by Mr. Keefe in opposition to exhibits 3 through 7. No objection to exhibits 1 and 2.
" "		ORDERED: Plaintiff's exhibits 1 through 7, admitted.
" "		Oral motion made by Mr. Keefe to dismiss Petition, followed by Mr. Langrock in opposition.
" "		Decision reserved.
" "		Court makes inquiry of Mr. Langrock, Mr. Keefe.
" "		Plaintiff given until January 7, 1977 to respond to Defendant's Memorandum of Law filed this date.
Jan 4	9	Filed defendant's memorandum of law.
" "	10	Filed Defendant's answer to Habeas Corpus
" "	11	Filed defendant's answer to petitioner's memorandum of law (See)

FILE DOCKET CONTINUATION SHEET

PLAINTIFF BERARD, FRANK	DEFENDANT KENT STONEMAN	DOCKET NO. 76-199 PAGE 2 OF 2 PAGES
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DATE	NR.	PROCEEDINGS
1977		
Jan 11	12	Filed Plaintiff's memorandum of law in response to Defendant's memorandum of law.
Mar. 8	13	" Memorandum and Order--Petitioner's application for a writ of habeas corpus is denied. Mailed copy to attorneys.
"	14	" Pltf's Notice of Appeal. Mailed copy to Judge Holden, Peter F. Langrock, Esq., Michael J. Sheehan, Esq. and Paul F. Hudson, Esq.
"	15	" Request for a Certificate of Probable Cause.
Mar. 15	16	Filed Order of Court: It is ORDERED: That the Appeal is not frivolous but presents a substantial question in the above entitled proceeding and he hereby is permitted to appeal said proceeding to conclusion without prepayment of fees or costs or security therefor. Mailed to Attys.
Mar. 16	17	Filed Certificate of Probable Cause. Mailed to Attys.
" 23	18	Filed Authorization to incur expense of transcript with approval
Apr. 19	19	" thereon in the amount of \$45. transcript of hearing 1-3-77.
Apr. 19		Mailed record on appeal to Clerk, U. S. Court of Appeals for the Second Circuit, N.Y., N.Y. Attys. notified.

EXCERPTS FROM TRIAL TRANSCRIPT

Paul F. Hudson, Esquire, and William T. Keefe, Esquire, appeared on behalf of the State; Peter F. Langrock, Esquire, appeared on behalf of Defendant, Frank J. Berard, Jr.

CROSS-EXAMINATION OF LINDA BADORE.

Questions about former false accusations and threats

Transcript page 880

* * *

Q. Linda, did you ever state to the authorities at the hospital that you had been carried off to Boston by racketeers and gangsters?

MR. HUDSON: Objection.

COURT: Sustained. Excluded.

CROSS-EXAMINATION CONTINUES:

Q. Linda, at any time, have you ever made allegations against other people of having been involved in criminal activity?

MR. HUDSON: Objection; completely irrelevant.

COURT: Yes. Sustained; excluded.

Q. Have you ever, Linda, ever made false accusations against any person involved -

MR. HUDSON: Objection.

COURT: Same ruling. Sustained.

Transcript pages 889-890.

* * *

CROSS-EXAMINATION CONTINUES:

Q. Linda, in the course of your medical treatment, have you ever related that you have been threatened by pistols and guns before?

MR. HUDSON: Objection.

COURT: Sustained; excluded.

Q. Have you ever been threatened by somebody with a gun before?

MR. HUDSON: Objection.

COURT: Sustained; excluded.

Q. Have you ever made false accusations -

MR. HUDSON: I believe the Court has already ruled.

COURT: Yes, already ruled.

MR. LANGROCK: We'd like to complete our question at the bench.

COURT: Yes, same question you asked before.

MR. LANGROCK: We don't think so.

(AT BENCH)

MR. LANGROCK: The question was - I don't remember the exact wording - but the contents would be, have you at any time made false accusations against other persons having pointed a gun at you or threatened you with a gun.

MR. HUDSON:

Already asked that question.

Questions relating to baby

Transcript pages 882 through 886.

* * *

CROSS-EXAMINATION CONTINUES:

Q. Linda, in your conversations with Frank, did he at any time ever talk to you about the - suggest to you that you not say anything against him because the police might do some - about your baby?

MR. HUDSON:

Objection. Beyond the scope of direct examination and not relevant.

COURT:

Yes, we don't think it is.

MR. LANGROCK:

May we make an offer at the bench?

(AT BENCH)

MR. LANGROCK:

In her novel, she says: "When I got off the phone, Frank and Butch told me the police would do anything to make me something - blank - to talk, if they thought I knew something. Frank said they would tell me all kinds of things. They might even try to use my baby to make me talk. Do pretty near anything to take him away from me". This is the statement she made.

MR. KEEFE:

There's no evidence the police ever did that.

MR. LANGROCK:

No, but shows her state of mind at the police station.

COURT:

We stand on our ruling.

CROSS-EXAMINATION CONTINUES:

Q. Linda, I think in direct examination yesterday, you indicated you have a youngster?

A. Yes.

Q. And how old is your youngster now?

A. Almost eight months.

Q. And that would make him about four months old when this occurrence happened?

A. He was a little over three.

Q. And you were very much concerned for the welfare of your child?

MR. KEEFE:

May we approach the bench, Your Honor?

COURT:

Yes.

(AT BENCH)

MR. KEEFE:

Your Honor, we object to this continued insinuation by questioning before a Court has ruled. He is presently testing the State's case even though he may never get the answer.

MR. LANGROCK:

If the Court please, Your Honor, we are taking a different tactic than we did before which is a direct statement. The motive here - an important motivation for her story - it is not necessarily important whether the statement made these matters the reason. I'm trying to get

at it that way. I did not want to make that insinuation, her state of mind, whether the statement would. It is that she would fabricate a story about her child - and perfectly proper in a proceeding of this nature -

MR. KEEFE: The Court has already ruled.

COURT: Not as far as the pending question.

MR. HUDSON: We feel the pending question is the way Mr. Langrock is going to ask it, for the State to motivate this woman to give any kind of story.

COURT: We'll allow her to answer this question.

(OPEN COURT)

CROSS-EXAMINATION CONTINUES:

Q. Will you read the pending question?

(Pending question read)

A. I don't know what you mean by that.

Q. Well, at the time this occurred, and in later conversations with Mr. Berard and eventually the police, did you have in mind the scene over your child?

A. Yes.

Q. And had - at a prior time - had your mother, in fact, made a complaint to the authorities about your child?

MR. HUDSON: Objection.

COURT: Sustained; excluded.

MR. LANGROCK: We would make an offer at the bench.

MR. LANGROCK: If it please the Court, we can - believe, we can - show by appropriate evidence that a complaint was filed by Linda's mother with the police about her care of the child, and that Linda had spoken to several people about the fact that she was very afraid she would lose the child, and I think very material of showing the potential motive of why this young lady would fabricate the entire story and cooperate with the police and have a better chance of keeping the child.

MR. HUDSON: What Linda's mother had to do in this regard predated the events we are here today about, and has nothing to do with this matter whatsoever.

COURT: Excluded.

(OPEN COURT)

CROSS-EXAMINATION CONTINUES:

Q. Linda, at the time you were taken from your home to the police station, prior to the inquest, you were alone, were you? Your child was not with you?

A. No.

Questions about the novel

Transcript pages 901-902.

* * *

Recross Examination by Mr. Langrock

Q. I think in redirect you mentioned that - you referred to

this (indicating) as a statement?

A. Yes.

Q. This is ninety-six pages long?

A. Yes.

Q. Double-spaced, typewritten?

A. Yes.

Q. Would it be a fair estimate that there's, at least, three hundred words to a page?

MR. HUDSON: Objection, your Honor; this is beyond the scope of redirect.

THE COURT: We are going to let her answer it.

Q. Would that be a fair estimate?

A. I guess so.

Q. And did you ever have any conversations with anybody about the possibility of publishing this?

MR. HUDSON: Objection; this is beyond the redirect.

THE COURT: Yes; we'll sustain that.

MR. LANGROCK: If it please the Court, perhaps, we should come to the bench with the offer.

THE COURT: All right.

(AT THE BENCH)

MR. LANGROCK: My recollection of the redirect is that the State attacked my reference to this - in the use of this - as being a novel and indicated it was a statement. And

I think the question of whether or not she hoped to publish it would have a bearing on the question of whether it was a statement and the characterization of it being a novel. I think it would be appropriate in that regard.

MR. HUDSON: I think it's immaterial; and I think it is beyond the scope of redirect.

THE COURT: Yes; I do, too.

(OPEN COURT)

Q. Mrs. Badore, the last three words of this, "To be continued" - -

MR. HUDSON: Objection, it's beyond the redirect, your Honor.

* * *

MEMORANDUM AND ORDER

OF THE

DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Frank Berard

v.

Kent Stoneman, Commissioner
of Corrections

Civil Action

File No. 76-199

MEMORANDUM AND ORDER

The petitioner, Frank J. Berard, Jr., has made application for writ of habeas corpus, under 28 U.S.C. § 2254, to obtain relief from confinement pursuant to a judgment of a state court. On January 19, 1973, after a trial by jury in the Windsor County Superior Court, the petitioner was found guilty of first degree murder for the killing of Raymond Lestage. He was sentenced to life imprisonment at the state prison. He appealed the conviction to the Vermont Supreme Court, challenging the trial judge's admission of evidence of prior homicides allegedly committed by the plaintiff, the restriction of cross-examination of Linda Badore, one of the chief prosecution witnesses and the exclusion of Ms. Badore's state hospital records. The Vermont Supreme Court rejected the petitioner's contentions and found that the trial judge did not abuse his discretion with regard to either the evidentiary rulings or the scope of cross-examination. State v. Berard, 132 Vt. 138, 315 A.2d 501 (1974). The petitioner's

application for a writ of certiorari to the United States Supreme Court was denied. Berard v. Vermont, 417 U.S. 950 (1974). Petitioner then applied to the Windsor County Superior Court for a new trial on the grounds of the existence of newly discovered evidence and the State's use of perjured testimony at the trial. This motion was denied. (Docket No. C2-72WrCr). This denial was appealed and approved by the Vermont Supreme Court. State v. Berard, 134 Vt. 220; 356 A.2d 514 (1976). Petitioner also had brought a petition for a writ of habeas corpus in the Windsor County Superior Court, claiming a violation of his constitutional rights in the conduct of the grand jury proceedings. This petition was denied and the dismissal was affirmed on appeal. Berard v. Moeykins, 132 Vt. 597, 326 A.2d 166 (1974).

Petitioner then filed an application for a writ of habeas corpus in the U.S. District Court for the District of Vermont. This application was subsequently dismissed without prejudice on October 16, 1975, for the reason that the petitioner was in escape status when the case was called for hearing. Berard v. Davallou, Docket No. 74-211. The present application for a writ of habeas corpus was filed after the petitioner was returned to state custody. On January 3, 1977, an evidentiary hearing was held. By agreement of the parties, the case was submitted on the transcript in the State murder trial and written and oral arguments of counsel.

The petition alleges that his Sixth Amendment right to confrontation of witnesses was violated by the trial judge's restriction of his cross-examination of Linda Badore. Specifically, he claims that he should have been able to question Ms. Badore further on her residence since the murder, possible protective custody by the police since the murder, fears she might have had concerning the police separating her from her child, plans to publish a lengthy statement concerning the Lestage murder and, finally, any threats by armed persons made against her, false accusations made by her and fantasies experienced in the past concerning her involvement in criminal activity.

The transcript presented to this court establishes that Lestage was murdered by the petitioner and one Raymond Rebideau in the early morning hours of August 13, 1972, during the course of a purported journey from Burlington, Vermont to Boston, Massachusetts. Lestage had accepted Berard's offer of a ride to that destination in the company of Rebideau and Badore. Rebideau's separate trial and conviction is reported in State of Vermont v. Rebideau, 132 Vt. 445 (1974).

Of those present at the scene of the crime, only Mrs. Badore testified at the petitioner's trial. Her direct examination commenced on the morning of January 12, 1973 and was concluded at mid-afternoon. Cross-examination of this witness continued for the remainder of the day; it was resumed

on January 13 and concluded on January 15, 1973, being interrupted only by the Sunday recess on January 14. The cross-examination is reported in 260 pages of transcript. In a most thorough and searching inquiry, defense counsel competently resorted to pretrial testimony given by the witness at an inquest conducted before a district judge, pursuant to 13 V.S.A. §§ 5101 et seq.; a deposition taken at the instance of the defendant pursuant to V.R.Cr.P. 15, testimony presented by the witness to the grand jury and an extensive written statement made by Mrs. Badore to Sgt. Richard A. Spear of the Vermont State Police.

Needless to say, in this context of the record, the petitioner does not urge that his right to confront Linda Badore was denied, as in Pointer v. Texas, 380 U.S. 400 (1965). His attack is directed to the trial court's exclusion of specific questions in certain aspects of his inquiry and in this, he places determinant reliance on Davis v. Alaska, 415 U.S. 308 (1974), which was decided subsequent to petitioner's trial and the decision of the Supreme Court of Vermont which affirmed the conviction. State v. Berard, supra at 148 et seq. ^{1/}

The question decided in the affirmative in Davis was - "whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status

as a juvenile delinquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency."

Davis v. Alaska, supra, 415 U.S. at 308.

The petitioner contends his right of confrontation was impermissibly restricted on questions relating to the witness Badore's bias, her possible prejudice and her credibility^{His claim relates} to four different areas of inquiry.

Protective Custody of Witness Badore

His first claim is that he was denied the opportunity to establish that Mrs. Badore was in protective custody from August 18, 1972 to the time of trial. Defense counsel, early in cross-examination inquired of the witness - "Since the 18th of August of this year (sic) where have you been living?" The State's objection to the question was sustained. However, a few questions later, counsel became more specific:

Q. Have you been in the custody of police officers continuously since the 18th of August?

A. Yes.

The information was repeated later in the examination. Earlier in the trial Sargeant Richard A. Spear^{of the Vermont State Police,} had been cross-examined to the same effect. This and other instances in the record demonstrate that the thrust of the petitioner's inquiry was fully answered. The jury was adequately informed of the

fact that Mrs. Badore had been in state custody prior to the trial. The petitioner asserts that Alford v. United States, 282 U.S. 687 (1931) is directly in point. In a federal prosecution for using the mails to defraud, a principal government witness and former employee of the accused, was asked at the start of cross-examination - "Where do you live, Mr. Bradley?" On the prosecution's objection that the question was immaterial and not proper cross-examination, the answer was excluded. The defendant sought to establish that the witness was in the custody of federal authorities. All further inquiries in this area were foreclosed, including the development that the witness' testimony could be biased because given under promise or expectation of immunity or under possible coercive effect by reason of his detention by federal officers. The opinion of the Court by Justice Stone, in reversing the conviction, without reaching any Sixth Amendment claim, points out - '

The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error.

Id. at 694 (citations omitted).

The context of Berard's trial is differently composed. The record is replete with references on both direct and cross-examination to the witness' custody and interrogation by police officers. Defense counsel was afforded the opportunity to explore this subject matter in depth.

The Child Custody

The petitioner claims his Sixth Amendment right to confront the witness Badore was violated in the trial court's restriction of his cross-examination concerning Mrs. Badore's fear that the State might deprive her of the custody of her three-month old child. The witness was asked if the petitioner ever suggested to her, in an effort to keep her from saying anything against him, that if she did, the police might do something about her baby. The question was excluded. Subsequently, the witness was allowed to answer a question by defense counsel to the effect that she was very much concerned for the welfare of her child; that in conversations with Berard, and eventually with the police, she had in mind "the scene over her child." The witness was then asked if at some prior time, the witness' mother had made a complaint about her child. On the State's objection, the answer was excluded over the defendant's claim that the witness was afraid she would lose her child - and that this concern was "the potential motive of why this young lady would fabricate the entire story and cooperate with the police and have a better chance of keeping the child." The examiner was permitted to show that when the witness was taken from her home to the police station, her child was not with her.

The witness was confronted with this aspect of her motivation and it was made abundantly clear to the jury that Mrs. Badore had much concern about what might happen to her

child. However, there is not the slightest indication in the record that the State of Vermont or any of its agencies threatened the witness with loss of custody. It appears that the only suggestion to this effect originated ^{with the petitioner himself} in a question asked by defense counsel within the hearing of the jury. The limitation imposed by the trial court on this phase of the third day of cross-examination is not of constitutional dimension.

Publication of a Novel

It appears that while Linda Badore was in police custody she prepared a handwritten statement of her version of the crime. Defense counsel had a copy of this account and used the document in cross-examination. In this effort, petitioner's attorney referred to the writing as her "novel." The witness referred to them as statements. On recross-examination the statement, which apparently was a typewritten copy, was exhibited to the witness. She was asked if she ever had any conversations with anybody about the possibility of publishing the writing. The State's Attorney objected that the inquiry was beyond the scope of his redirect examination. The defendant's attorney responded that the question had a bearing on whether the writing was properly characterized as a "statement" or a "novel." The court sustained the objection.

The petitioner in these proceedings attacks the ruling as denying him the opportunity to show her motive in testi-

lying was to profit financially from the petitioner's conviction. This claim was not advanced at the trial and, even had it been, there was no impairment of the petitioner's right to cross-examine. The question came at the conclusion of cross-examination that consumed the major portion of three trial days. The theory of the defense that the witness had undertaken to write a novel about this gruesome experience was persistently driven home to the jury. In this context of the record this court is not persuaded that the trial court's exercise of its discretion exceeded federal constitutional standards.

False Accusations and Reported Fantasies

The petitioner contended at the trial that the witness Badore "fantasized (the) complete story" - which she testified to at the trial. In pursuit of this theory the witness was cross-examined concerning her hospitalization for mental illness.^{2/}

As appears in the margin, the witness was asked if she ever stated to the authorities at the hospital that she had been carried off to Boston by racketeers and gangsters; had she ever made false accusations against other people of having been involved in criminal activity. Later she was asked if in the course of her medical treatment she had ever related that she had been threatened by pistols and guns or had ever been threatened before by somebody with a gun. Over the State's objection, further inquiry into statements made

by the witness in the course of her psychiatric consultation and treatment was precluded.

That the witness had been hospitalized and treated for mental illness and psychiatric problems was repeatedly presented to the jury through extensive inquiry by the defense and the prosecution as well. It appeared that she had been confined at the state hospital at least three times prior to August, 1969, when she was sixteen and was subsequently treated at the psychiatric unit of the Vermont Medical Center. The effort of the petitioner's counsel at the murder trial to elicit various statements made by the witness while she was undergoing psychotherapy some four years earlier was an area properly within the discretion of the trial judge. The witness' propensity for indulging in fantasy and underlying mental illnesses of Mrs. Badore was clearly exposed in the more than two hundred fifty pages of her cross-examination which preceded this particular inquiry. Beyond that, independent evidence was presented through a psychiatrist, called by the defendant, that Mrs. Badore was a good actress and a neurotic, self dramatic person. The error, if any there was, is to be measured in terms of the court's discretion, rather than the fundamental right of confrontation within the precept of Davis v. Alaska, supra, 415 U.S. at 319. United States v. Finkelstein, 526 F.2d 517, 529 (2d Cir. 1975).

The theory of the defense that Mrs. Badore's testimony was the product of complete fantasy is entirely belied by

the record. Substantially every aspect of the evidence presented by the State through this witness, concerning the details of her accompaniment of Berard, Rebideau and the victim, from the evening of August 12 through August 13, 1972, was corroborated by disinterested and unimpeachable witnesses. The witness Badore's testimony was further confirmed by incriminating physical evidence that was jettisoned along the route of travel directed by the petitioner from Burlington to Royalton and the roundabout return journey following the murder.

Conclusion

The court's concern is not whether the trial court committed evidentiary error in excluding the particular questions asked of the witness Badore by defense counsel. The ultimate and controlling question is whether the exclusions violated the Confrontation Clause of the Sixth Amendment within the meaning given in Davis v. Alaska, supra, 415 U.S. at 315.

The petitioner's right to confront Linda Badore is secured in state as well as federal criminal trials and includes the right of cross-examination. Id.; Pointer v. Texas, 380 U.S. 400, 417 (1965).

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce

evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony.

Davis v. Alaska at 316.

At Berard's trial there apparently was no record of prior convictions on the part of the witness. However, the accused cross-examined the witness to develop the point that she "had driven on another job for Frank (Berard) involving stolen motors and had done" other criminal jobs at his request. Her involvement in the murder was clear and defense counsel inquired exhaustively as to each and every detail of the witness' observation at the murder scene.

The witness' sordid life history was the subject of continuing and repetitive inquiry. It was shown that she was a psychopath who was addicted to alcohol, that she had consumed an excess of drinks on August 12 and that she told the petitioner she was sick on the morning of August 13 because she had "too much to drink the night before." Defense counsel questioned Mrs. Badore extensively concerning the narrative she had written while in police custody, which defense counsel repeatedly referred to as her "novel." In sum, the record effectively demonstrates that defense counsel was unrelenting in delving into the witness' story and testing her perceptions. Every facet of the witness' character, her mental illness and her motivations were covered in one fashion or another. In the course of the extensive cross-

examination over the large part of three trial days the trial court was now and then called upon to preclude remote, repetitive and sometimes harassing inquiries. The court's reading of the extensive record fails to indicate that any of the exclusionary rulings directly affected the guilt or innocence of the accused. Rather, they concerned collateral matters that were otherwise developed in Badore's testimony or evidence by other witnesses.

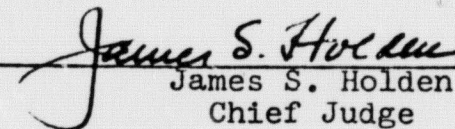
Whether the petitioner's claims are measured in terms of the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment protecting fundamental right to a fair trial, the constitutional objectives are essentially the same. The denial of cross-examination or its significant obstruction calls into question the "integrity of the fact finding process."

Chambers v. Mississippi, 410 U.S. 284, 295 (1973); Berger v. California, supra, 393 U.S. at 315. But unlike the crucial foreclosure of cross-examination of witnesses who had made prior confessions in that they, rather than the defendants, were the killers as in Chambers and in Winters v. Vincent, No. 76-2126 (2d Cir., Feb. 2, 1977) slip op. p. 1672, the trial court's restrictive rulings were tangential to the main areas of inquiry that had been explored in depth, with the witness Badore and by questioning of other witnesses. The total cross-examination was entirely adequate to afford the jury a basis to properly appraise the witness' motiva-

tion and to evaluate the theory of the defense that her testimony was not worthy of belief. See United States v. Ong, 541 F.2d 331, 342 (2d Cir. 1976); United States v. Campbell, 426 F.2d 547, 550 (2d Cir. 1970).

The record of the trial tendered by the petitioner fails to establish that there was an unconstitutional limitation imposed on his right to confront and cross-examine the witness Badore. The petitioner's application for a writ of habeas corpus is denied. It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 8th day of March, 1977.


James S. Holden
Chief Judge

Footnotes

1/ The respondent filed a memorandum of law to support its position that Davis v. Alaska should not have retroactive application. The court is differently persuaded by Berger v. California, 393 U.S. 314, 315 (1969) which gave full retroactive application to Barber v. Page, 390 U.S. 719 (1968). Berger and Barber both concerned federal habeas corpus applications, claiming denial of constitutional right of confrontation. Accordingly, this court, in considering the merits of the present petition, applies Davis with retroactive effect.

2/ Q On direct examination, you testified that you had been hospitalized at a mental institution on several occasions?

A. Three occasions.

Q And what were thos (sic) three occasions? Where was it?

A. Where was it?

Q Un huh.

A. Vermont State Hospital in Waterbury.

Q And three separate times at the Vermont State Hospital?

A. Yes.

Q And have you ever been hospitalized in the psychiatric ward at the DeGoesbriand?

A. Yes.

Q So you have been hospitalized four times?

A. Yes.

Q You also testified that you had not had any psychiatric help at all since you last left Waterbury, is that right?

A. I think so.

Q Did you ever see a Dr. Forsberg?

A. Yes.

Q Was that after or before the last time in Waterbury?

A. She was my doctor the last time.

Q And didn't you see her as an outpatient after that, in Montpelier, or saw her as an outpatient in Waterbury?

A. Yes, I think I did.

Q And didn't you in fact make several appointments after that that were broken?

MR. HUDSON: This is beyond the scope of direct examination.

COURT: We're going to allow it.

WITNESS: Yes.

CROSS-EXAMINATION CONTINUES:

Q Now, how old were you when you were first admitted to the DeGoesbriand?

A. I think I was sixteen.

Q Excuse me?

A. I think I was sixteen.

Q And what was the medical cause for you going in there at that time, do you remember?

A. I had run away from home and my mother put me there.

Q Had you ever received any other psychiatric help from any other institution in the State besides those you mentioned?

A. As an outpatient at the DeGoesbriand.

Q And when you were at Woodstock, did you receive any help there?

MR. HUDSON: Objection. Outside the scope of direct examination.

COURT: Yes. Sustain the objection.

CROSS-EXAMINATION CONTINUES:

Q You were hospitalized at Waterbury on three occasions. On the first occasion, what was the reason that you were hospitalized?

A. I was very depressed.

Q Was there a suicide attempt involved?

MR. HUDSON: Objection. Beyond the scope of direct examination.

COURT: We'll let her answer.

WITNESS: No.

CROSS-EXAMINATION CONTINUES:

Q Not that time?

A. No.

Q Have you ever attempted suicide?

A. Yes.

Q How many occasions?

A. Three, I think.

Q Linda, did you ever state to the authorities at the hospital that you had been carried off to Boston by racketeers and gangsters?

MR. HUDSON: Objection.

COURT: Sustained. Excluded.

CROSS-EXAMINATION CONTINUES:

Q Linda, at any time, have you ever made allegations against other people of having been involved in criminal activity?

MR. HUDSON: Objection; completely irrelevant.

COURT: Yes. Sustained; excluded.

Q Have you ever, Linda, ever made false accusations against any person involved -

MR. HUDSON: Objection.

COURT: Same ruling. Sustained.

Q Linda, do you know what your diagnosis was when you
 were at Waterbury on these different occasions?

MR. HUDSON: Objection. We think irrelevant.

COURT: We'll let her answer yes or no.

WITNESS: I believe it was suicide.

CROSS-EXAMINATION CONTINUES:

Q Did anyone ever tell you have (sic) have a passive
 aggressive personality?

MR. HUDSON: Objection.

COURT: Sustained; excluded.